(3)

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-778

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,

Respondent,

MEMORANDUM OF RESPONDENT THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Larry Cowger
Counsel of Record
David J. Heinemann
General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027
(913) 271-3157

7 pp

No. 96-778

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,

Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,

Respondent,

MEMORANDUM OF RESPONDENT THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Larry Cowger
Counsel of Record
David J. Heinemann
General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027
(913) 271-3157

SUPREME COURT OF THE UNITED STATES

Williams Natural Gas Company, Petitioner,	)	
v.	)	No. 96-778
Kansas Pipeline Partnership, Respondent	)	

MEMORANDUM OF RESPONDENT THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Respondent, the State Corporation Commission of the State of Kansas (KCC or Commission) files this memorandum in support of the Petition for Writ of Certiorari filed herein by the Petitioner, Williams Natural Gas Company (WNG or Williams). The KCC supports the issuance of a Writ of Certiorari to review an order of the Supreme Court of the State of Kansas denying review of an order of the Court of Appeals of the State of Kansas which held that the failure of the KCC to reach a decision of the merits of certain public utility applications within the 240-day period prescribed by Kan. Stat. Ann. § 66-117(b) denied Kansas utility ratepayers the right to have the applications considered on their merits. In support of the Petition, the KCC states as follows:

STATEMENT OF THE CASE

This matter concerns a decision by the KCC in an application filed by Kansas Pipeline Partnership (KPP) seeking KCC approval of five gas sales and transportation contracts (the contracts) with Western Resources, Inc. (WRI). After a long and arduous evidentiary proceeding all parties submitted briefs to the Commission including KPP, WNG, the KCC Staff, the Kansas Citizens' Utility Ratepayer Board (CURB), WRI, and Missouri Gas Energy (MGE). Prior to the issuance of a decision on the merits by the KCC, the Federal Energy Regulatory Commission (FERC) ordered that KPP is part of an interstate pipeline system subject to FERC's plenary jurisdiction under the Natural Gas Act.[1] This Commission held that the FERC assertion of jurisdiction constituted "an amendment to the application" to approve the contracts as that term is used in Kan. Stat. Ann. § 66-117(b) (the Statute). Using this finding as a basis, the KCC restarted the 240-day statutory decision period.[2] The KCC stayed further action on the application pending a final FERC decision concerning its jurisdiction over KPP. On appeal to the Court of Appeals of the State of Kansas (Court of Appeals), the KCC's decision was reversed and the Court of Appeals found that the contracts were "deemed approved" because the KCC failed to issue a decision on the merits within 240 days.

The KCC sought both rehearing at the Court of Appeals and review by the Kansas Supreme Court, which were

---

[1] KansOk Partnership, Kansas Pipeline Partnership, & Riverside Pipeline Co., 73 FERC ¶ 61,160 (1995).

[2] Kan.Stat.Ann. 66-117 provides that various utility filings will be "deemed approved" if the KCC fails to issue a decision within 240 days.

denied. The KCC disagrees with the Court of Appeals interpretation of its discretion to restart the 240-day decision period under Kan. Stat. Ann 66-117(b). However, the KCC does not raise any issues relating to the Court of Appeals' interpretation of the Statute because such issues do not raise important federal questions.

The KCC does support this Court's review of the Appellate Court's decision on the basis that the Statute, as applied, violates the Constitution's guarantee of due process of law by denying the right of the parties to these proceedings in particular, and utility ratepayers, in general, to an opportunity to be heard on the merits.

THE STATUTE AS APPLIED BY THE LOWER COURT VIOLATES DUE PROCESS

Under prior decisions of this Court, a Due Process Clause analysis raises two questions:

(1) Were Kansas Utility ratepayers deprived of a protected interest; and

(2) If so, what process was due?[3]

No State shall "deprive any person of life, liberty, or property, without due process of law. . . "[4] The Due

---

[3] *Burns v. United States*, 501 U.S. 129, 146-48 (1991); *Washington v. Weller Harper*, 494 U.S. 210, 228 (1990).

[4] U.S. Const. amend. XIV.

Process clause requires, "that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case".[5] Without a decision on the merits the right to notice and a hearing are rendered meaningless.[6]

Kansas law provides Kansas' utility ratepayers the right to participate in KCC proceedings and the public generally is represented in utility rate hearing by the Staff of the KCC (Staff) and also through the participation of CURB.[7] Because it is based in state law, this right is a form of property right to which due process protection must be afforded.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) presented a very similar statement of facts. The statute in *Logan* required an agency to hold a hearing within 120 days of the filing of a complaint. When the employment claim was dismissed solely because the agency neglected to act within the statutory time requirement, this Court held that such denial violates the Due Process Clause.[8]

---

[5] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306,313 (1949).

[6] *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 433 (1981).

[7] Kan. Stat. Ann. § 66-1223.

[8] *Logan*, 455 U.S. at 434-35. *See also, Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

Several other states have similar statutes which contain comparable provisions to the Kansas Statute,[9] therefore review of the decision should be viewed as involving an important federal question.

CONCLUSION

The 240-day statutory decision period prescribed by Kan. Stat. Ann. § 66-117(b) is unconstitutional as applied to Kansas utility ratepayers in this matter by the Court of Appeals of the State of Kansas. The denial of a decision on the merits of the utility applications below denied Kansas utility ratepayers of a decision on the merits of the applications, violating the due process protections secured to them by the Fourteenth Amendment.

Respectfully submitted,

Larry Cowger
Counsel of Record
David J. Heinemann
General Counsel

Attorneys for the
State Corporation Commission
of the State of Kansas

December 9, 1996

---

[9]Minn. Stat. § 216B.16(2) (a) (1995); Mo. Ann. Stat. § 392.230(5) (Vernon 1996) (telephone); Neb. Rev. Stat. § 19-4616(7) (1996) (municipal utilities); S.C. Code Ann. § 58-5-240 (E) (Law. Co-op. 1995); Tex. Corps. & Ass'ns Code Ann. §§ 2.212(d), 3.211 (d), 5.08(d) (West 1995); Utah Code Ann. § 54-7-12 (3)(c) (1996); Vt. Stat. Ann. tit. 30, § 227(a) (1996); Wis. Stat. § 196.19(d) (1994).